Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARTIN RUTHERFORD; NANJA RUTHERFORD,
PETITIONERS

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Internal Revenue Service allowed to intimidate the jury in a criminal tax trial in order to secure a conviction of the Petitioners?

2. Did the government overcome the presumption of prejudice beyond a reasonable doubt when the jury admits that possible retaliation by the IRS was discussed amongst jurors prior to deliberation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 19

CONCLUSION 26

APPENDIX

Circuit Court Opinion 1a

Order Denying Rehearing 10a

District Court Decision 11a

Relevant Provisions Involved 18a

Transcript 20a

TABLE OF AUTHORITIES

Page

CASES

GOLD V. UNITED STATES, 352 U.S. 985, 1 L. ED. 2D 360, 77 S. CT. 378 (1957) 14

REMMER V. UNITED STATES, 347 U.S. 227, 98 L. ED. 654, 74 S. CT. 450 (1954) 13, 16

REMMER V. UNITED STATES, 350 U.S. 377, 382, 100 L. ED. 435, 76 S. CT. 425 (1956) 13, 14

UNITED STATES V. ARMSTRONG, 654 F.2D 1328, 1332 (9TH CIR. 1981) 15

UNITED STATES V. BRANDE, 329 F.3D 1173, 1178 (9TH CIR. 2003) 16

UNITED STATES V. CHEEK, 94 F.3D 136, 144 (4TH CIR. 1996) 26

UNITED STATES V. ELIAS, 269 F.3D 1003 (9TH CIR. 2001) 14, 23, 25, 26

UNITED STATES V. HARBIN, 250 F.3D 532, 544 (7TH CIR. 2001) 13

UNITED STATES V. HENLEY, 238 F.3D 1111, 1118 ..... *passim*

UNITED STATES V. RUTHERFORD, 371 F.3D 634 AT 639 (9TH CIR. 2004) 12, 13, 19

OPINIONS BELOW

Appellants, Martin and Nanja Rutherford were indicted on December 8, 1999 for violation of 26 U.S.C. §7206(1) - making and subscribing a false income tax return (count one); and 26 U.S.C. §7203 - failure to file income tax return (count two). On January 31, 2000, bond was posted by Martin Rutherford, and also by Nanja Rutherford.

This case was tried to a jury which entered verdicts in against the Rutherfords. Because of the overwhelming evidence supporting acquittal, a number of interviews were taken of the jurors. The interviews were belatedly given as members of the jury were afraid of possible retaliation against them by the IRS. It took several months to obtain affidavits from jurors as the same feared, and still fear, retaliation from the Internal Revenue Service. This intimidation was effectuated by a large number of IRS employees who sat adjacent to the jury box during most of the trial. While occupying that space, the IRS employees stared at the jurors. This staring caused consternation among certain jurors. The Jurors were admittedly intimidated by the IRS during the trial and feared retaliation if they did not convict. The Rutherfords did not receive their Sixth Amendment right to a fair trial because of the intimidation of members of the IRS of the jurors in the underlying trial.

The Petitioners filed a Motion for New Trial after learning of the intimidation of the IRS agents of the jurors during trial. Initially, the Motion was denied, and appealed to the Ninth Circuit. The Ninth Circuit remanded for a new hearing on a Motion for New Trial and directed that the jurors be allowed to testify as to the effect that the IRS' presence had on them during trial. At the second hearing the district court properly

ruled that the Rutherfords had established a presumption of prejudice. However, the district court then ruled that there was no clear and convincing evidence that the intimidation had any effect on the jurors, and in fact erroneously considered whether it affected the ultimate vote to convict the Rutherfords.

On January 26, 2006, the Court of Appeals for the Ninth Circuit affirmed the conviction of Martin and Nanja Rutherford. Petitioners filed a Petition for Rehearing which was denied by the Ninth Circuit Court of Appeal. Mandate was issued on March 31, 2006.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the District of Nevada is found in Sections 7206(1), and 7203 of Title 26, United States Code as amended. Venue is proper pursuant to Rule 18 of the Federal Rules of Criminal Procedure. Subject matter jurisdiction for the Court of Appeals for the Ninth Circuit was invoked through 28 U.S.C. §1291. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED (see appendix)

In affirming the conviction the Ninth Circuit held:

> Indeed, the record is more than adequate to support the district court's finding that the alleged misconduct of the attending IRS agents did not have a reasonable possibility of impeding the jury's freedom of action. We affirm the district court's decision that the alleged staring and glaring was harmless beyond a reasonable doubt.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

STATEMENT

a. General Background and Description

Martin Rutherford is a Chiropractor who founded and manages with his wife, Nanja, a chiropractic business known as the Chiropractic Arts Center. Prior to 1992, the Rutherfords had consistently filed their federal income tax returns. During 1992, a number of questions arose concerning the deductibility of business management courses sponsored by the Church of Scientology and the propriety of a previously conducted audit for the years 1988-1990. Due to the Rutherfords' affiliation with the Church of Scientology, the Rutherfords' federal income tax returns for the years 1988-1990 were chosen for audit. Because of confusion related to the 198801992 audit and the current deductibility of Scientology sponsored management courses, the Rutherfords sought the legal advise of two tax attorneys (Pono Bognus and Jerry Aurillo). At the request of the IRS, Mr. Bognus filed the 1992 return. A dispute exists as to whether IRS employees filled in zeros on the return in order to substantiate their criminal case. Because of lingering problems related to the same issues, Mr. Aurillo recommended that the 1993 return not be filed until a resolution was reached on the prior years' returns.

b. The 1988-1990 federal income tax audit.

1. Introduction.

A number of factors impacted the Rutherfords'

prosecution for the years 1992 and 1993. Most notable was their treatment by the IRS due to their affiliation with the Church of Scientology. As a result of that affiliation the Rutherfords were subjected to an audit for the years 1988-1990. A number of errors occurred during that audit that incorrectly increased taxes due for that period. During 1993, the errors were discovered and disclosed to the IRS. Refunds due from the incorrect audit could be carried forward and to reduce taxes due for the 1992 and 1993 tax years. The history of the 1988-1990 audit is important as it explains why compliance with 5 U.S.C. §552a(e)(3) is necessary to protect taxpayers from being improperly targeted by the IRS.

2. Retaliation for the Rutherfords' affiliation with the Church of Scientology.

During the initial meeting with the IRS concerning the 1988-1990 audit, Dr. Rutherford was threatened by Agent Valenzuela with criminal prosecution if he did not fully agree with adjustments. AT the time, Agent Valenzuela had not completed the audit. In fact, all that Agent Valenzuela knew was that the Rutherfords were affiliated with the Church of Scientology. Agent Valenzuela admittedly predetermined substantial audit adjustments imply because the Rutherfords were Scientologists. Those adjustments included the disallowance of all deductions taken for payments made to the Church of Scientology (both donations and expenditures for business management courses). Shocked by Agent Valenzuela's threats, Dr. Rutherford complained directly to the IRS senior management. As a result of that complaint, the Rutherfords suffered retaliation including, but not limited to, an incorrect audit

determination for the years 1988-1990; further threats of criminal prosecution; improper collection activity; and finally criminal prosecution.

3. Undisclosed conflicts.

Obviously, Agent Valenzuela was prejudiced against the Rutherfords, and all other individuals affiliated with the Church of Scientology. For that reason alone, Agent Valenzuela should not have participated in the 1988-1990 audit. Another conflict was equally shocking. Mr. Valenzuela had worked for the Rutherfords' CPA's, Bernard & Vogler while the Rutherfords sought and received that firm's tax advice. Agent Valenzuela should not have audited any Bernard & Vogler clients that were firm clients at the time that he was employed by that firm. Neither the IRS nor Bernard & Vogler disclosed the conflict to the Rutherfords.

4. Audit done without the 1988 return.

The 1988-1990 audit was a sham. At trial, no less than four tax experts determined that the Rutherfords were over assessed as a result of the audit by more than $150,000.00. No experts contradicted this testimony. In fact, during trial, Agent Valenzuela admitted that he audited at least one tax year (1988) without having the income tax return in his possession. Also during trial, Agent Valenzuela admitted that he had denied all of the Scientology expenditures because that was the position taken by the IRS at the time. Those deductions included expenditures for management courses sponsored by the Church of Scientology. Those deductions were proper business expenditures under IRC § 162 and/or deductible donations. In the audit file, there were notations made by

the IRS's summary witness, John Breathwaite, that a substantial amount of the Scientology expenditures were deductible. Nonetheless, the IRS refused to correct their audit, and instead, retaliated with extensive collection activity (e.g., liens and levies upon the Rutherfords' assets). Effectively, the Rutherfords were liened and levied even though the IRS owed them money.

5. The audit work papers were grossly deficient.

During trial, the Rutherfords produced four accounting and tax experts each with substantial experience and exceptional reputation. The Rutherfords' experts determined that the IRS's audit was, in fact, improper, and had resulted in a substantial overpayment.

Also, significant were "summary adjustments". The "summary adjustments" were nothing more than the unexplained differences between the tax return and accounting records. A difference existed because the accounting records were maintained on an "accrual basis, while th tax reut4rns were on a "cash basis". Moreover, the "summary adjustment" was based on "draft" documents prepared by Bernard & Vogler, Agent Valenzuela's previous employer. Obviously, draft financial records should not have been provided to the IRS by Bernard & Vogler, but were based upon their close relationship with Agent Valenzuela. As is discussed above, the IRS auditor, Phil Valenzuela, had unlimited access to the Rutherfords' accounting records while he worked for Bernard & Vogler, and thereafter, because he had a special relationship with those Accountants. During 1992, as a result of the 1988-1990 audit results, the Rutherfords paid, either directly or indirectly through improper levies, approximately $180,000.

6. IRS Settles with the Rutherfords for 1988-1990.

After being threatened by Mr. Valenzuela with criminal prosecution and at the behest of Bernard & Vogler, the Rutherfords agreed to a settlement with the IRS for the years 1988-1990. Under the terms of the settlement, the Rutherfords immediately paid $50,000, and owed approximately $111,000 to the IRS . Interest and penalties were waived. Also, the IRS agreed that the Rutherfords could pay the balance (approximately $111,000) over a reasonable term under a payment plan. Immediately after reaching this agreement, the IRS levied all of the Rutherfords' bank accounts. The levies devastated the working capital of the Chiropractic Arts Center. At the time that the Rutherfords settled with the IRS, they did no know about Mr. Valenzuela's conflict with Barnard & Vogler; that negotiations were ongoing between the IRS and the Church of Scientology concerning the deductibility of expenditures made as donations or for business management courses; or that the audit prepared by Mr. Valenzuela was grossly defective. The Rutherfords were simply told to pay or go to jail. The Rutherford settlement agreement was subsequently breached by the Government (e.g., additional interest and penalties were assessed against the Rutherfords and they were not allowed to make payments under a payment plan).

Eventually, the Rutherfords learned about Mr. Valenzuela's conflict; deficiencies in the audit; and that the Scientology deductions were proper. When the Rutherfords brought this to the attention of the IRS management, the IRS requested a meeting to resolve the parties' disputes. Apparently agreeing that the Rutherfords had overpaid their taxes. It was common

knowledge that if the overpaid taxes had been properly applied to the Rutherfords' 1992 and 1993 tax years, no taxes, interest or penalties would have been due for those years. Instead of acknowledging that refunds were due to the Rutherfords, the IRS simply ignored amounts due to the Rutherfords and continued improper collection activity. In a good faith attempt to resolve the dispute, the Rutherfords hired two tax attorneys (Pono Bognus and Jerry Aurillo). As the IRS had done, Mr. Bognus filed a return for 1992 and the 1993 return was placed on hold pending an outcome of the earlier disputes. Although not allowed to be admitted as evidence at trial, the IRS told the Rutherfords that the government would file their 1993 return. Believing that the government was acting in good faith, the Rutherfords agreed to have the IRS prepare their return for 1993. The Rutherfords relied upon the IRS representations for the years 1992 and 1993. Subsequently, the Rutherfords were indicted for filing a zero return for 1992 and not filing a return for 1993.

7. The IRS did not disclose to the Rutherfords that it had made a Retroactive settlement with the Church of Scientology

Not only did the IRS fail to disclose that they were conducting a criminal investigation un the auspice of civil collection activity, they failed to adjust for amounts determined to be property deductible as business expenses or donations under a retroactive settlement agreement reached with the Church of Scientology. During 1993 while aggressive collection activity was being pursued against the Rutherfords, the IRS reached a private settlement with the Church of Scientology.

That settlement was retroactive. Pursuant to the settlement, the IRS issued Revenue Ruling 9373 which allowed Scientology donations as deductible expenditures. Business courses offered by the Church of Scientology were already deductible, under I.R.C. §162. In any event, all of the Rutherfords' Scientology related expenditures were deductible either as §162 expenditures or as charitable donations. Because of the settlement, it was the expert opinion of Messrs. Orgill and Schlingheyde that the previous audit and the related settlement should have been adjusted recognizing a credit for the previously disallowed Scientology expenditures made during 1988-1990. Instead of properly adjusting the Rutherfords accounts, the IRS aggressively sought payment for the total amount assessed by Mr. Valenzuela.

8. IRS misrepresents its intent to Criminally prosecute the Rutherfords

Eventually, the Rutherfords and the IRS met in an attempt to resolve the disputes. During the meeting that occurred, the IRS did a number of things which led the Rutherfords to believe that they did not owe taxes for 1992 and 1993. For example, the IRS filed a return for the Rutherfords in 1992 that showed no taxes were due (a"zero return"). Moreover, the IRS agreed to file the Rutherfords 1993 return. That evidence was not allowed at trial. IRS notices were received which confirmed that no taxes were due. While acting as if they were sympathetic to the Rutherfords' predicament, the IRS was actually conducting a secret criminal investigation through its civil collection division. None the less, having previously been threatened by Mr. Valenzuela, Dr. Rutherford specifically asked IRS agents and/or officers what the purpose was of information requested by the

IRS (e.g., why haven't you filed your 1993 return, why did you file a zero 1992 return). Instead of responding honestly, the IRS concealed their criminal investigation.

c. Trial in U.S. District Court

1. Conviction

Trial commenced on September 13, 2000. After 15 days of trial, a jury found both the Defendants, Martin and Nanja Rutherford, guilty of violating 26 U.S.C. §7206(1) - making and subscribing a false income tax return (count one); and 26 U.S.C. §7203 - failure to file income tax return (count two). Counts 1 and 2.

2. Many IRS agents attended trial and intimidated the jury

This case was tried to a jury which entered verdicts in against the Rutherfords. Later, it was learned that the jury had been intimidated by the IRS. This intimidation was effectuated by a large number of IRS employees who sat adjacent to the jury box during most of the trial. While occupying that space, the IRS employees stared at the jurors. This staring caused consternation among certain jurors. Jurors admitted that there was some discussion as to possible retaliation against jurors by IRS auditors if they voted for acquittal, and that the IRS would be able to make it very difficult for individuals who crossed them. After these juror interviews, it became apparent that the damaging evidence discussed above had affected jurors objectively. The factual evidence offered in this case overwhelmingly supported acquittal.

The Rutherfords did not receive their Sixth

Amendment right to a fair trial because of the intimidation by members of the IRS of the jurors in the underlying trial.

3. First Hearing on Motion for New Trial

The Petitioners filed a Motion for New Trial after learning of the intimidation of the IRS agents of the jurors during trial. The district court granted a hearing on this issue, but refused to permit the Defendant to introduce evidence of the effect the overwhelming presence of the IRS and the glaring had on the jurors and denied the motion. The Ninth Circuit determined the standard the District Court applied during the first hearing to be incorrect as follows:

> At the end of the evidentiary hearing, the district judge found credible the testimony of a juror that agents sitting in the first and second row behind the prosecution had glared and stared at the jurors; he also noted that the jurors had discussed this fact among themselves on more than one occasion. According to the district judge, however, the issue was whether the government agents intended to intimidate or influence the jurors. He held that the Rutherfords had failed to prove that "[the conduct] of the IRS personnel was intentionally an effort to influence the jury. This means a knowing threat of some sort or other, an intentional act to influence the jury, a knowing and intentional act designed to influence the jury." After finding that there was "no credible evidence that the IRS . . . intended to [] influence the jury," the court shifted the burden of proof to the defendants and required them to establish actual

> prejudice in order to be granted a new trial. Because the Rutherfords could not prove "actual prejudice," the court denied their motion for a new trial.

United States v. Rutherford, 371 F.3d 634 at 639 (9th Cir. 2004)

4. Directive given by Ninth Circuit in Remand

In its Opinion remanding the case for an evidentiary hearing this Court gave the District Court specific direction as to what to consider in a second hearing and the standard to apply:

> They[**2] also assert that the jury was prejudiced because a large number of IRS and government agents sat directly behind the prosecution table throughout the trial and glared at the jurors, intimidating them, and causing some of the jurors to fear that if they acquitted the Rutherfords, the IRS might retaliate against them. In this regard, the Rutherfords assert that the district court improperly restricted the scope of the evidentiary hearing and impeded their ability to make a prima facie showing that the jurors were adversely influenced by the government agents' conduct. **The Rutherfords' more fundamental contention, however, is that the district court erred in finding that they must prove that the agents "intended" to influence the jurors. According to the Rutherfords, they need show only that the agents' conduct created a risk that the verdict might be influenced,**

> **regardless of the government's motive. On the latter two points, we agree with the Rutherfords. Accordingly, we vacate the district court's ruling, and remand for further proceedings.** [emphasis added]

Id at 635.

> [I]n *Remmer v. United States*, 347 U.S. 227, 98 L. Ed. 654, 74 S. Ct. 450 (1954) ("Remmer I"), the Court established that [HN4] **any "private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury" is deemed "presumptively prejudicial" and placed a heavy burden on the government to rebut the presumption by proving that the error was harmless beyond a reasonable doubt**. Id. at 229; see also *United States v. Henley*, 238 F.3d 1111, 1118 (stating that **once the presumption applies the government must demonstrate that "there is no reasonable possibility that [a juror] was affected in his freedom[**19] of action as a juror" as to defendants)** (internal quotations and ellipses omitted). The importance of the application of the presumption cannot be overstated. [HN5] Where a juror is improperly contacted during a trial, "the potential for prejudice . . .is significant" but it is often "very difficult for the defendant to prove." *United States v. Harbin*, 250 F.3d 532, 544 (7th Cir. 2001). In *Remmer v. United States*, 350 U.S. 377, 382, 100 L. Ed. 435, 76 S. Ct. 425 (1956) ("Remmer II"), the Court suggested that only "unauthorized intrusions" into the "sanctity of the

jury's right to operate as freely as possible" purposefully made might trigger the presumption of prejudice. Id. at 382. Shortly thereafter, however, in a case in which intent was admittedly lacking, the Court clarified the issue, holding that the "fact that the intrusion was unintentional does not remove the effect of the intrusion." *Gold v. United States*, 352 U.S. 985, 1 L. Ed. 2d 360, 77 S. Ct. 378 (1957)...

...

Further, in ***United States v. Elias***, 269 F.3d 1003 (9th Cir. 2001), **in determining whether the presumption of prejudice should apply**, we again looked not to the intent of the individual alleged to have tampered with the jury, but rather to the jurors' perceptions of the conduct at issue. In Elias, after the verdict was entered, the [*643] trial judge learned that the defendant had approached a juror and asked her what it would take to buy her off. Id. at 1019. The judge presumed that the contact was prejudicial and immediately held an evidentiary hearing. Id. At the hearing, the jurors testified that they believed that the defendant had made the comments in jest. Id. at 1019. They informed the court that the alleged remarks did not scare them or distract them from listening to the evidence and that they were able to remain fair and impartial in the case. Id. at 1020. We concluded that the district court conducted an appropriate inquiry. Id. Again, the inquiry in Elias was centered not on whether the defendant had intended to bribe the jurors -- the defendant was not called to testify about his intent in making[**25] the comments -- but on the jurors' perception of the defendant's conduct, i.e. whether

they believed he was joking or serious and whether the defendant's conduct had scared or distracted them. Id. at 1020. Thus, it is clear from our precedent that [HN9] when considering possible incidents of jury tampering or intimidation, "we are ultimately not so concerned with their nature as with the prejudice they may have worked on the fairness of the defendant's trial." *United States v. Armstrong*, 654 F.2d 1328, 1332 (9th Cir. 1981). Accordingly, in cases in which the circumstances suggest that the improper communication or contact is sufficiently serious that it might prejudice the jurors we have afforded the presumption of prejudice; in the case of other more "prosaic kinds of jury misconduct" we have not. *Henley*, 238 F.3d at 1116 (discussing the difference); see also *Dutkel*, 192 F.3d at 894 (discussing the difference); *Angulo*, 4 F.3d at 848 n.7 (same).

In this case, the conduct at issue was that of government agents intimately associated with the prosecution. The IRS and DOJ agents sat directly behind the prosecution[**26] table throughout the trial, several of the agents were key witnesses in the case, and the prosecutor turned around and conversed with the agents during the trial proceedings and trial breaks. At least one juror alleged that a number of the agents regularly glared at her and her fellow jurors. **The courts have emphasized that [HN10] judges should exercise additional caution when government employees are involved, because of a heightened concern that the jurors will not "feel free to exercise [their] functions" with the Government "looking over [their]**

shoulders." *Remmer I*, 347 U.S. at 229; see also *United States v. Brande*, 329 F.3d 1173, 1178 (9th Cir. 2003) (stating that special duty of judges to ensure impartiality of the jury is "heightened when a potential breach of impartiality may have resulted from the act of a court employee"). Because of the perceived, as well as actual, power that government actors have at their disposal and the positions of authority that they occupy, we have held that even seemingly innocuous juror conversations and contact between such individuals and a juror can trigger a presumption of prejudice. [footnote omitted]

[*644] For these reasons, we hold that the district court erred in concluding that the defendant must prove that the individuals involved intended to influence or prejudice the jurors in order for the presumption of prejudice to apply. [HN11] **The appropriate inquiry is whether the unauthorized conduct "raises a risk of influencing the verdict," *Caliendo*, 365 F.3d at 697, or "had an adverse effect on the deliberations," *Henley*, 238 F.3d at 1115.** However, because, as we discuss below, we also conclude that the district court erred in limiting juror testimony at the evidentiary hearing to "the existence of such conduct at the time it occurred," it would not be appropriate for us, on this incomplete record, to determine whether the presumption should apply and whether the jurors were adversely influenced by the agents' conduct at the trial. Rather, we leave that task to the district judge following the holding of a further evidentiary hearing.[footnote omitted]

Although the line that courts have drawn between the forms of juror testimony that are admissible and even inadmissible to show juror bias is imprecise -- and although some may consider it artificial – **we have made it clear that [HN12] a court may not, under Rule 606(b), consider testimony "regarding the affected juror's mental processes in reaching the verdict."** *Elias*, 269 F.3d at 1020 (citing *Henley*, 238 F.3d at 1118) (emphasis added). Thus, for example, a juror cannot testify to whether an outside influence caused him to change his vote from innocent to guilty. However, a court can and should consider the "effect of extraneous information or improper contacts on a juror's state of mind," a juror's "general fear and anxiety following" such an incident, and any other thoughts a juror might have about the contacts or conduct at issue. Id. **In this regard, a juror's testimony concerning his fear that individuals would retaliate against him if he voted to acquit (or convict) would be admissible, although his statement that he actually cast his vote one way or the other because of that fear would not.** See *Dutkel*, 192 F.3d at 898[**29] (considering evidence that, because of the improper contacts, the juror was "a disturbed and troubled man, deeply concerned about his own and his family's safety") (internal quotations omitted). Further, [HN13] evidence regarding any influence that such improper conduct or contacts had on the jurors' abilities to fairly and impartially receive the evidence, listen to the testimony presented, and the judge's instructions is also admissible. Compare *Elias*, 269 F.3d at 1021

(finding no juror bias because both jurors testified that the defendant's comments were in jest and that they "did not preoccupy them at the time, frighten them, or distract them from focusing on the evidence"), with *Henley*, 238 F.3d at 1117 (stating that because juror's concerns may well have prevented him from "thinking about the evidence or paying attention to the judge's instructions," the presumption of prejudice should apply) (internal quotation omitted). Finally, [HN14] [*645] the court may consider the likely consequence of actions that might cause jurors to feel intimidated regardless of whether the jurors admit such an effect. n9 Thus, [HN15] objective and subjective factors may both be considered. [**30]

In view of the above, we agree with the Rutherfords that the district court erred in limiting juror testimony to "the existence of [IRS] conduct at the time it occurred." **On remand, the district court should allow the parties to introduce evidence[**31] regarding the jurors' perceptions of the agents' conduct and any discussions among the jurors concerning the possibility of IRS retaliation if they voted to acquit.** See *Henley*, 238 F.3d at 1117 (stating that testimony "regarding a juror's more general fear and anxiety following a tampering incident . . . is admissible for the purposes of determining whether there is a reasonable possibility that the extraneous contact affected the verdict.") (internal quotation omitted). **After reviewing the evidence, if the court determines that the agents' conduct raised a risk of influencing the verdict, then the presumption of prejudice**

should be applied.

In sum, because the district court applied the wrong legal standard and improperly limited the scope of the evidentiary hearing, we vacate and remand for further proceedings consistent with this opinion. If upon completion of those proceedings, the district court concludes that the verdict was tainted, the judgment of conviction shall be set aside and a new trial may be conducted, if the prosecution so elects. **Should, however, the district court determine that no jury intimidation or tampering occurred, it shall reinstate the[**32] judgment.**

United States v. Rutherford, 371 F.3d 634 at 640-645 (9th Cir. 2004). [emphasis added]

In the present case, the district court allowed the jurors to testify as to the effect that the IRS' presence had on them during trial, and properly ruled that the Rutherfords had established a presumption of prejudice. However, the district court then ruled that there was no clear and convincing evidence that the intimidation had any effect on the jurors, and in fact erroneously considered whether it affected the ultimate vote to convict the Rutherfords. The Ninth Circuit Court of Appeals affirmed. There was overwhelming evidence to overcome the clear and convincing standard and a new trial should have been granted by the district court.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS JUDGMENT OF

CONVICTION OF MARTIN AND NANJA RUTHERFORD BY FINDING THAT THE INTIMIDATION OF JURORS DID NOT VIOLATE THE SIXTH AMENDMENT

a. Jury Intimidation

This Petition raises an important Constitutional issue which is IRS intimidation of jurors during trial, and the effect that the intimidation had in denying the Rutherford's Sixth Amendment guarantee to trial by a fair and impartial jury.

The lower courts ignored the standard set forth in *Henley v. U.S.*, 238 F.3d 1111 (9th Cir. 2001) in determining whether the government had overcome the presumption of prejudice when there has been jury tampering. Rather, the lower courts likened this case to *Elias v. U.S.* , 269 F.3d 1003 (9th Cir 2001), a case in which it was clear that the contact was not taken seriously but considered "in jest". In the present case. juror testimony in the present action established that at least one juror was distracted for the first week of trial by the intimidating stare of the IRS agents , and one or more jurors were genuinely and seriously concerned about the effect of voting against the IRS and the possibility of retaliation therefrom. This fear was discussed right at the beginning of or near the time of deliberation. Substantial evidence supporting acquittal was proffered during trial. This evidence was ignored because some members of the jury feared "acquittal retaliation". "Acquittal retaliation" was confirmed by the presence of a large contingency of staring IRS employees who regularly attended the proceedings.

b. The District Court erred in not applying the standard set forth in *Henley, supra*

In its order ruling that the government had overcome the presumption of prejudice, the District Court stated:

> We conclude on the basis of that test that the staring by the IRS agents at specific jurors was sufficiently serious that it might prejudice the jurors. The **staring was potentially prejudicial, we therefore find the presumption of prejudice arises.**
> We then turn to the question of whether the Government has rebutted a presumption of prejudice by proving the conduct involved, thus the staring, is harmless, beyond a reasonable doubt.
> The court of appeals cites as a see also the case of *U.S. v. Henley*, 238 f.3d 1111, 1117, 9th Cir 2001, for a test harmless beyond a reasonable doubt.
> **The test there, found in the parenthesis explaining the holding of Henley, is whether the government has shown there is no reasonable possibility that a juror was affected in his or her freedom of action as to the defendants, whether the conduct interfered, and I `m interpolating here these tests, with the jury's deliberations by distracting one or more jurors, or introducing some extraneous factor into the deliberations, or worked a prejudice on the fairness of the Defendant's trial.**

The court of appeals in our case does not appear to be adopting the reasonable possibility

test as a test different from harmless beyond a reasonable doubt, but is merely citing it as an example of one interpretation of harmless beyond a reasonable doubt. It is fair to say that likely the Henley test is really not a test different from harmless beyond a reasonable doubt, which is the more customarily used expression, in other words, if there's a reasonable possibility that a juror was affected in his or her deliberations the error is not harmless beyond a reasonable doubt.

In *Chapman v. California*, 386 U.S.. 18, 1967, the Supreme Court holds that there is little if any difference between the statement whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The Chapman case adopts the appropriate test for harmless beyond a reasonable doubt, and sees no difference from the Henley announcement, or pronouncement.

...

We look, as directed by the court of appeals, to the likely consequences of the staring, whether or not the jurors admit they were affected or not, although as I noted before, the jurors' own testimony is not to be entirely disregarded, it is simply not determinative in and of itself, both subjective and objective factors may be considered.

...

Since there are government agents involved here, particularly IRS agents, the court

of appeals teaches that there is a heightened concern that jurors will not feel free to exercise their functions when they come in contact with such agents or employees.

The ultimate question is whether the staring worked a prejudice on the fairness of the trial. **A likely consequence of the staring appears to be that the jurors as a result of the staring would discuss and consider the IRS, the number of agents present, possible IRS retaliation or audits. The evidence showed that this did occur. Nevertheless, it appears that the staring and its affect did not affect the final outcome of the case**, it was harmless, it did not affect the jurors' ability to fairly and impartially receive the evidence, listen to the evidence presented, think about the evidence, pay attention to the Judge's instruction, or ability to deliberate.

We do not there rely solely on the testimony of the Jurors, but to all of the evidence, and there is other evidence to support those propositions.

In comparing the facts of this case to *U.S. v. Elias*, 269 f.3d 1003, (9th Cir. 2001), and *U.S. v. Henley*, 238 F.3d 1111, 1117, (9th Cir. 2001), as we are instructed by the court of appeals, the facts here more closely resemble Elias, where the court found the contact had no effect on the jurors' deliberations. There is no reasonable basis in the evidence to infer that the staring and its effect affected the deliberations or verdict.

Juror Vicki Walker testified that she was intimidated but only at the most for the first two weeks of the trial, but that after that it didn't

bother her. Juror Hartung testified as to discussions about the time the jurors noticed the staring about retaliation by the IRS, he testified this occurred about the time the deliberations began and about the time the jurors noticed the staring or glaring.

This testimony conflicts as to timing with that of other jurors noticing the staring during the first two weeks of the trial and discussing it at that time.

All of the jurors who testified testified unconditionally, unhesitatingly, and resolutely, and in our view credibly, that the conduct of the IRS agents did not affect the outcome of the case, that's certainly persuasive, although not determinative.

We conclude that the staring was harmless on that basis. The staring was also harmless beyond a reasonable doubt because there's no credible basis to infer here in the circumstances that the jurors would have hesitated to act because of the staring and its effects in matters of such importance as the verdicts in this case.

Therefore, we find that the IRS agents' conduct in staring at the jurors and the effects of the staring was harmless beyond a reasonable doubt.

Ruling of district court.

The district court erred by likening this case to *Elias* where none of the jurors took the threat of juror intimidation seriously. This was incorrect, the testimony of at least three the jurors and others clearly establishes that the threat of the IRS was taken very seriously by at least one juror and that there was "no reasonable

possibility" that at least one or more of the jurors was affected by this intimidation. The facts shows intimidation occurred, resulting in jurors having to adjust at trial. Even the description by one juror as feeling that she had seen a sheriff following her in her rear view mirror demonstrates that the IRS presence affected that juror. While the jurors were adjusting to the undisputed presence of the powerful IRS, very powerful evidence was introduced.

While each of the jurors claimed to that the conduct did not affect their ability to be fair and impartial during trial, the Ninth Circuit acknowledged that "jurors are often reluctant to disclose whether thy were influenced by improper contact". *Rutherford v. USA*, *supra at ftn 9*. The intimidation obviously impacted the jury's ability to be impartial and properly absorb all of the evidence at trial. Many of the jurors admitted that the subject of retaliation of the IRS if they did not convict the Rutherfords was raised just at the time deliberations were to begin. This is way beyond a "reasonable possibility" that the jurors were affected. Undisputedly it was a factor on their mind which denied the Rutherfords' right to a fair trial

In the present case, the evidence is undisputed that IRS employees regularly attended trial, and intimidated the jurors by staring at them. This intimidation interfered with the impartial role of the jury, and warrants a new trial. By the district court's own admission, the IRS did not prove beyond a reasonable doubt that no prejudice occurred. Instead, the district court applied the definition of reasonable doubt as set forth in *Elias*, in which the juror tampering conduct was a joke. In the present case, the court ruled that the Petitioners had met their burden of a presumption of prejudice, which was the main issue in *Elias* which is

relevant to the present action. By this finding, the district court determined the conduct was not a joke.

In regard to the governments burden to overcome the presumption of prejudice, the Ninth Circuit instructed the district court to apply *Henley*, which it refused to do. Rather, the district court improperly applied *Elias*, and the Ninth Circuit affirmed.

CONCLUSION

Undisputedly, at least one juror, Mrs. Walker, was subjected to the large IRS contingent which stared at her during trial. The presence and staring affected her for at least two weeks of the trial. The district court properly found that the Rutherfords has established the presumption of prejudice, which then shifted the burden to the government to prove that there was "no reasonable possibility" that the jury or any one juror was affected in his duty as a juror during trial. The lower courts should not have discounted the testimony of several jurors, particularly that of Ms. Walker, of the general fear and anxiety created by the IRS intimidation, which supports a finding that there was a "reasonable possibility that the extraneous contact affected the jury" *Henley*, supra at 1118, citing *United States v. Cheek*, 94 F.3d 136, 144 (4th Cir. 1996). In the present action, the government failed to overcome the burden that there was no "reasonable possibility" that any of the jurors were affected in their role. Nevertheless, the District Court had already predetermined that it would uphold the conviction and to justify the same applied the standard set forth in *Elias*, *supra* , which is a direct violation of the directive of this Court. As a result, the Rutherfords were denied trial before a fair and impartial jury, and the convicted must be vacated.

THEREFORE, Petitioners Martin and Nanja Rutherford request of this Court that it GRANT this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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(any footnotes trail end of each document)

No. 04-10603

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

MARTIN RUTHERFORD; NANJA RUTHERFORD,
Defendants - Appellants.

October 18, 2005, Argued and Submitted, San Francisco, California

January 23, 2006, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Mark S. Determan, United States Department of Justice, Criminal Enforcement Section, Washington, DC; Alan Hechtkopf, Attorney, Michael E. Karam, Esq., DOJ - U.S. DEPARTMENT OF JUSTICE, Tax Division, Washington, DC.

For MARTIN RUTHERFORD, NANJA RUTHERFORD, Defendant - Appellants: Marie Mirch, MIRCH & MIRCH, Reno, NV.

JUDGES: Before: B. FLETCHER and REINHARDT, Circuit Judges, and RESTANI,** Chief Judge, United States Court of International Trade.

OPINION: MEMORANDUM*

Before: B. FLETCHER and REINHARDT, Circuit Judges, and RESTANI,** Chief Judge, United States Court of International Trade.

In this case, we again address an appeal by Martin and Nanja Rutherford from their convictions under 26 U.S.C. §§ 7203 and 7206(1) for tax evasion. We now affirm their convictions.

I.

Following a sixteen-day trial, the Rutherfords were convicted of one count of willfully failing to file an income tax return, *see* 26 U.S.C. § 7203, and one count of willfully making a false income tax return, *see* 26 U.S.C. § 7206(1). The district court denied their motion for a new trial, and the Rutherfords appealed. In addition to other claims not relevant to the appeal now before us, the Rutherfords contended that they had been denied their right to a trial by fair and impartial jurors under the Sixth Amendment. They alleged that "the jury was prejudiced because a large number of IRS and government agents sat directly behind the prosecution table throughout the trial and glared at them, intimidating them, and causing some of the jurors to fear that if they acquitted the Rutherfords, the [*3] IRS might retaliate against them." United States v. Rutherford, 371 F.3d 634, 635 (9th Cir. 2004).

In a previous decision, we held that the district court had applied the wrong legal standard in evaluating the Rutherfords' Sixth Amendment claim. Whereas the district court had required the Rutherfords to prove that the IRS *intended* to intimidate the jury, we held that this was too heavy a burden. *See* id. at 640, 644. Drawing on recent Ninth Circuit authority, we held that the proper inquiry is whether allegedly improper contact with a juror "'raises a risk of influencing the verdict'" or "'has an adverse effect on the deliberations.'" Id. at 644 (quoting Caliendo v. Warden, 365 F.3d 691, 698 (9th Cir. 2004), and United States v. Henley, 238 F.3d 1111, 1118 (9th Cir. 2001)). We explained that, under Supreme Court precedent, any "'unauthorized intrusions'" into the operation of the jury are "'presumptively prejudicial.'" Id. at 641 (quoting Remmer v. United States (Remmer II), 350 U.S. 377, 382, 76 S. Ct. 425, 100 L. Ed. 435, 1956-1 C.B. 641 (1956), and Remmer v. United States (Remmer I), 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)). [*4] Once the presumption of prejudice applies, we explained, a conviction is invalid unless the government can demonstrate that the error was harmless beyond a reasonable doubt. *Id.* (quoting Henley, 238 F.3d at 1118 (quoting United States v. Dutkel, 192 F.3d 893, 897 (9th Cir. 1999))). We then remanded the case to the district court to conduct an evidentiary hearing on the issue of jury tampering. Id. at 644.

On remand, the district court conducted the required evidentiary hearing. The hearing involved testimony from all eleven living jurors, an employer of one of the jurors, as well as the Rutherfords' investigator and his

wife. At the conclusion of the hearing, the district court found that the "likely consequence of the staring appears to be that the jurors . . . would discuss and consider the IRS, the number of agents present, [and] possible IRS retaliation or audits." The judge therefore ruled that the presumption of prejudice applied. The district court also ruled, however, that the government had met its burden of proving beyond a reasonable doubt that the agents' conduct was harmless. The district court noted that all eleven jurors testified [*5] "unconditionally, unhesitatingly, and resolutely, and in our view credibly, that the conduct of the IRS agents . . . did not affect the jurors' ability to fairly and impartially receive the evidence, listen to the evidence presented, think about the evidence, pay attention to the judge's instruction, or [their] ability to deliberate." Accordingly, it held that the government had proved that any interference with the jury had been harmless and upheld the Rutherfords' convictions.

The defendants appealed, and we have jurisdiction under 28 U.S.C. § 1291. The Rutherfords advance two arguments on appeal: (1) that the district court again applied the wrong legal standard on remand, and (2) that the district court's holding was erroneous, given the evidence available prior to and presented at the hearing. We address each argument in turn.

II.

The Rutherfords first contend that the district court applied the wrong legal standard on remand. *See* Appellant's Opening Brief at 24-25, 35-38. Whether the district court applied the proper standard to evaluate the Rutherfords' claim of jury tampering is an issue of

law that we review *de novo*. *See* Rutherford, 371 F.3d at 645. [*6]

Our previous opinion established a two-step analysis for the district court. First, we held that the district court had to determine whether the presumption of prejudice applied by evaluating "whether the unauthorized conduct 'raises a risk of influencing the verdict' or 'had an adverse effect on the deliberations.'" Id. at 644 (quoting Caliendo v. Warden, 365 F.3d 691, 698 (9th Cir. 2004), and United States v. Henley, 238 F.3d 1111, 1118 (9th Cir. 2001)). Second, we held that, if the presumption of prejudice applies, the district court must determine whether the government had met its "heavy burden . . . to rebut the presumption by proving that the error was harmless beyond a reasonable doubt." Id. at 641. In explaining this second step of the inquiry, we cited to our decision in *United States v. Henley*, in which we described the harmless-error standard as requiring the government to prove that "there is no reasonable possibility that [a juror] was affected in his freedom of action." *Id.* (quoting Henley, 238 F.3d at 1118).

We find that the district court correctly followed the prescribed analysis. [*7] Finding that the presumption of prejudice applied, the district court nonetheless held that the agents' staring was "harmless beyond a reasonable doubt" because "there's no credible basis to infer here in the circumstances that the jurors would have hesitated to act." The district court further stated that the staring "did not affect" the jurors' capacity to receive evidence, evaluate evidence, follow instructions, or deliberate. In short, the district court properly applied the harmless-error review set forth by the

Supreme Court in Remmer and later explained by the Ninth Circuit in Henley.

The Rutherfords argue that the district court applied the wrong standard because it did not employ the "no reasonable possibility" language used in our decision in *Henley*. But *Henley* -- and others cases like it, *see, e.g.*, Caliendo, 365 F.3d at 691; United States v. Dutkel, 192 F.3d 893, 899 (9th Cir. 1999) -- merely rephrase the harmless-error standard set forth by the Supreme Court in the *Remmer* cases. *See* Henley, 238 F.3d at 1114-15 ("The Supreme Court announced the standard governing allegations of jury tampering in [*8] *Remmer v. United States.*"). That is the test we required the district court to apply on remand, and that is the test it actually applied.

The Rutherfords also argue that the district court's analysis was improper because the judge considered whether the agents' staring and glaring affected the jury's verdict. According to the Rutherfords, our previous decision held that the district court should not consider whether the jury tampering affected the outcome of the case. To the contrary, what we held was that a claim of jury tampering does not fail simply because the alleged tampering did not affect the outcome. The district court did not err in considering and concluding that the outcome of the case was not affected by the alleged misconduct of the IRS agents. (In fact, it is *necessary*, though not *sufficient*, that the district court determine that the alleged tampering did not affect the verdict, for if it had affected the verdict, such tampering could not have been harmless.) While it is true that the district court observed that "the staring . . . did not affect the final outcome of the case," it also

noted that this observation was "persuasive, although not determinative. [*9] " In short, we conclude that the district court correctly applied the harmless-error standard that we directed it to apply.

III.

The Rutherfords next contend that the district court erred by holding that the government met its burden of proving harmless error. *See* Appellant's Opening Brief at 25, 27-28, 37-38. "Because the district court held extensive evidentiary hearings and made findings of fact, we review the findings of fact to determine whether they are 'clearly erroneous.'" United States v. Elias, 269 F.3d 1003, 1020 (9th Cir. 2001) (quoting Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co., 206 F.3d 900, 911 (9th Cir. 2000)).

We are not persuaded that the district court's factual determinations were clearly erroneous. Seven of the jurors -- Kaylor, Washington, Porter, Foster, Guiles, and Campbell -- testified that they did not notice IRS agents staring at them, that they had no concern during the trial about IRS retaliation, and that they did not hear any discussion about such retaliation. n1 Three other jurors testified that there had been discussion of IRS retaliation, but these jurors viewed that discussion as a "joke" (Juror [*10] Clegg), as mere "comments" about the power of "the IRS itself" (Juror Hoff), or as concern about "the power of the IRS" rather than "concern about being . . . stared at" (Juror Hartung). The final juror (Juror Walker), who had been most unnerved by the staring, testified that she initially felt "uncomfortable" but that the "distraction" of staring "didn't bother [her]" once she grew accustomed to the

presence of the agents.

In evaluating the evidence, the district court specifically considered and weighed the testimony that the agents' staring attracted the jury's attention. For example, the district court particularly reviewed the testimony of Juror Walker -- who was by far the most concerned about retaliation [*11] and the most attentive to the IRS agents' glares -- and concluded that she had overcome her initial distraction and was able to concentrate on the evidence as it was presented. Likewise, the district court closely evaluated Juror Hartung's testimony connecting the agents' staring to the discussion by some jurors about IRS retaliation but concluded that the jurors agreed that they could nonetheless judge the case fairly and without fear. These are precisely the sort of factual determinations that district courts must make, and the district court found here that the alleged staring and glaring did not affect the capacity of the jurors to receive or evaluate the evidence or to render a verdict based on a fair deliberation. The district court's findings were not clearly erroneous.

Indeed, the record is more than adequate to support the district court's finding that the alleged misconduct of the attending IRS agents did not have a reasonable possibility of impeding the jury's freedom of action. We affirm the district court's decision that the alleged staring and glaring was harmless beyond a reasonable doubt.

For the foregoing reasons, the judgment of the district court is **AFFIRMED.** [*12]

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

n1 Juror Keil's testimony was contradicted by his former employer, who testified that Keil had in fact reported that "some of the jurors were concerned about being audited." Keil, however, testified that he did not recall conversations in which jurors said they might be subject to retaliation by the IRS.

3/26/2006
No. 04-10603
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

MARTIN RUTHERFORD; NANJA RUTHERFORD,
Defendants - Appellants.

Order

JUDGES: Before: B. FLETCHER and REINHARDT, Circuit Judges, and RESTANI,** Chief Judge, United States Court of International Trade.

The petition for rehearing is DENIED.

Footnotes

** The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

CR-N-99-159-ECR (RAM)

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA RENO, NEVADA

UNITED STATES OF AMERICA, Plaintiff;

VS.

MARTIN P. RUTHERFORD and NANJA RUTHERFORD, Defendant.

MINUTES OF COURT

Date: October 27, 2004

PRESENT: EDWARD C. REED, JR.,
SENIOR U. S. DISTRICT JUDGE
Deputy Clerk: Colleen Larsen; Reporter: Cathy Worken U. S. Attorney, by: Mark Determan
Counsel for Defendants: Richard Young; Kevin Mirch; Marie Mirch

MINUTES OF EVIDENTIARY HEARING: (3rd Day) At 4:08 P. M. Court reconvenes; defendants are present. The Court makes its findings for the record.
IT IS HEREBY ORDERED as follows:
1) that the presumption of prejudice applies, but that presumption has been rebutted by government;
2) that there was no cognizable intimidation or tampering which occurred;
3) that judgment of conviction and the sentence imposed by this Court, as directed by Court of appeals, is reinstated.

IT IS FURTHER ORDERED that the execution of the sentences imposed by the Court are stay pending appeal, provided notice of appeal of this order is filed within ten (10) days of this date IT IS FURTHER ORDERED that defendants are continued on present conditions of rele pending, provided that a notice of appeal is filed within ten (10) days from this date.

At 5:00 P. M. Court adjourns; defendants are continued on bond.

EXHIBIT LIST

Case No.: CR-N-99-159-ECR (RAM) Exbibits in behalf of: Defendants United States of America vs. Martin and Nanja Rutherford Hearing: Evidentiary Hearing

Date Admitted	Date Marked	Exh. #	Description
10/25/04	10/25/04	A	Affidavit of Vickie Walker
10/25/04	10/25/04	B	Affidavit of Graham Hartung
10/25/04	10/25/04	C	Affidavit of Terry Hoff
10/25/04	10/25/04	D	List of Names and Addresses of Jurors

10/25/04 E Affidavit of Sandra Crow

CR-N-99-159-ECR (RAM)
UNITED STATES DISTRICT COURT DISTRICT OF NEVADA RENO, NEVADA

UNITED STATES OF AMERICA, Plaintiff;

VS.

MARTIN P. RUTHERFORD and NANJA RUTHERFORD, Defendant.

MINUTES OF COURT
Date: October 27, 2004

PRESENT: EDWARD C. REED, JR., SENIOR U. S. DISTRICT JUDGE

Deputy Clerk: Colleen Larsen; Reporter: Cathy Worken U. S. Attorney, by: Mark Determan
Counsel for Defendants: Richard Young; Kevin Mirch; Marie Mirch

MINUTES OF EVIDENTIARY HEARING:
At 10:07 A. M. Court convenes; defendants are present. On motion by Government counsel, the Rule of Exclusion is invoked; all witnesses are admonished not to discuss this case until called to testify, and are excused from the Courtroom.
VICKIE WALKER is called by defense counsel, sworn and testifies, then is excused, subject recall.
GRAHAM HARTUNG is called by defense counsel, sworn and testifies, then is excused, sub to recall.

TERRY HOFF is called by defense counsel, sworn and testifies, then is excused. At 12:03 P. M. Court recesses.
At 1:35 P. M. Court reconvenes.
d AA additional witnesses are brought oh t into the P Courtroom arid admonished not to discuss the case
CHARLES THOMAS WISEMAN is called by defense counsel, sworn and testifies, then excused, subject to recall.
Defendant's Exhibits A, B, C, are ordered admitted into evidence.
Defendants rest, with the exception of the calling of one possible witness tomorrow morning.
STEPHANIE KAYLOR is called by Government counsel, sworn and testifies, then is excuse
DARLENE CLEGG is called by Government counsel, sworn and testifies, then is excused.
GEORGE WASHINGTON is called by Government counsel, sworn and testifies, then is excused
JOEL PORTER is called by Government counsel, sworn and testifies, then is excused.
At 3:01 P. M. Court recesses; at 3:28 P. M. Court reconvenes.
DOUGLAS FOSTER is called by Government counsel, sworn and testifies, then is excused.
FRANCES GUILES is called by Government counsel, sworn and testifies, then is excused. Court and counsel confer.
At 4:00 P. M. Court recesses and this hearing is continued to Tuesday, October 26, 2004. 9:30 A.M.

CR-N-99-159-ECR (RAM)

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA RENO, NEVADA

UNITED STATES OF AMERICA, Plaintiff;

VS.

MARTIN P. RUTHERFORD and NANJA RUTHERFORD, Defendant.

MINUTES OF COURT

Date: October 25, 2004

PRESENT: EDWARD C. REED, JR., SENIOR U. S. DISTRICT JUDGE
Deputy Clerk: Colleen Larsen; Reporter: Cathy Worken U. S. Attorney, by: Mark Determan
Counsel for Defendants: Richard Young; Kevin Mirch; Marie Mirch
MINUTES OF EVIDENTIARY HEARING: (2"° Day) At 9:34 A. M. Court convenes; defendants are present.
CATHERINE CAMPBELL is called by Government counsel, sworn and testifies, then is excused DAVID JOHN PIGMAN is called by Government counsel, sworn and testifies.
Objection by defense counsel to testimony to be elicited from this witness; arguments presenter does not appear that the requirements of Rule $07 have been met, and this witness will not allowed to *testify in* respect to hearsay testimony, however the witness may testify as to the stated mind of the decedent juror.

DAVID JOHN PIGMAN, previously sworn, resumes the stand and testifies further, then excused.

RUSSELL KEIL is called by Government counsel, sworn and testifies, then is excused, subject recall.

At 11:05 A. M. Court recesses; at 11: 28 A. M. Court reconvenes.
Defense counsel advise the Court that their next witness is not unavailable under this afternoon Court and counsel confer.
At 11:35 A. M. Court recesses.
At 1:34 P. M. Court reconvenes; defendants are present.
CHRISTINA WISEMAN is called by defense counsel, sworn and testifies, then is excused.
Defendants rest.
At 1:45 P. M. Court recesses.
At 2:05 P. M. Court reconvenes.
On stipulation of counsel, all witnesses *who were* being held subject to recall, are now released, may attend further proceedings herein, if they wish.
Arguments are presented by respective counsel.
Matter stands submitted. The Court will announce its decision tomorrow, October 26, 2004 3:00 P. M.
At 4:00 P. M. Court recesses and this hearing is continued until Wednesday, October 26, 2004 3:00 P. M.

26 § 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined no more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 5564 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 § 7206. Fraud and false statements

Any person who -

(1) Declaration under penalties of perjury willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it

is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter;

Amendment VI (the **Sixth Amendment**) of the United States Constitution codifies rights related to criminal prosecutions in federal courts:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.